Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 10, 1991

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OR91-173

Dear Mr. Acevedo:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 10794. We have reviewed the documents you submitted to us and conclude that those documents must be released in their entirety.

The documents submitted for our review consist of a letter dated July 9, 1990, from an attorney with a Corpus Christi law firm and investigative documents compiled by the law firm or by the school board concerning the conduct of a school superintendent. The letter dated July 9, 1990, informs the superintendent of the board's proposal to dismiss him, the reasons for the proposal, and the procedures for requesting a hearing before the board. The first paragraph of the letter refers to the board's authorization on June 27, 1990, for the attorney to act on behalf of the board and to notify the superintendent of its proposal.

With regard to the letter dated July 9, 1990, you rely on exceptions 3(a)(1), 3(a)(2), and 3(a)(3), as well as exceptions 3(a)(7) and 3(a)(11). You reassert one or more of these exceptions with regard to the investigative documents. We turn first to the letter dated July 9, 1990.

Section 3(a)(2) protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Personnel file information is confidential under this section only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the Open Records Act. Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the test for invasion of privacy

under section 3(a)(1), information is excepted from disclosure if it contains highly intimate or embarrassing facts about a person's private affairs, the release of which would be highly objectionable to a person of ordinary sensibilities, and it is of no legitimate interest to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977). The information contained in the July 9, 1990, letter concerns the school board's proposal to terminate a school superintendent and the reasons for that proposal. The public has a legitimate interest in knowing how the board and its agents are conducting school business. *See* Open Records Decision No. 579 (1990) at 2-3; *see also* Open Records Decision No. 574 (1990) (holding that section 3(a)(1) does not incorporate attorney work product doctrine). Thus, sections 3(a)(1) and 3(a)(2) do not except the letter from disclosure.

Section 3(a)(3) also does not except the notice letter from disclosure. Section 3(a)(3), the litigation exception, "protects a governmental body's position in litigation, in part, by imposing the necessity that the adverse party develop information through the normal process of discovery." Open Records Decision No. 551 (1990) at 4-5. Section 3(a)(3) applies only to information *related to* current or reasonably anticipated litigation. *Id.* at 4. The exception applies only until completion of the current litigation or if subsequent litigation is reasonably anticipated.

We are informed that the board and superintendent have entered into a settlement agreement. That settlement agreement, which is not part of a judicial order or decision, makes confidential all documents surrounding the proposed termination. We are advised that the board might be subject to a lawsuit for violation of the settlement agreement. The Open Records Act does not permit governmental bodies to use their contractual powers to avoid compliance with the Open Records Act. *Compare* Open Records Decision No. 283 (1981) (governmental bodies prohibited by the Open Records Act from entering into agreements to keep public information confidential) *with* Open Records Decision No. 349 (1982) (public information made confidential pursuant to settlement recorded in a court order as excepted from disclosure). Thus, section 3(a)(3) is not applicable.

Section 3(a)(7) does not protect the notice letter from disclosure. Section 3(a)(7) protects from disclosure only material within the attorney-client privilege of Rule 503 of the Texas Rules of Evidence -- communications between the client and

his attorney including requests for legal advice and statements of fact communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or an associated attorney. Open Records Decision No. 574 (1990). Communications with third parties are not within the exception. *Id.* at 5. Although the July 9, 1990, letter is signed by an attorney as the board's agent, it is not addressed to the board but to the superintendent. Thus, the letter is not a privileged attorney-client communication and is outside the scope of section 3(a)(7).

Finally, the notice letter is not protected from disclosure by section 3(a)(11). Section 3(a)(11) protects from disclosure only advice, opinion, and recommendation used in the decisional process within a governmental agency or between agencies. Open Records Decision Nos. 559 (1990); 462 (1987). First, the notice letter does not contain any advice, opinion, or recommendation to be used within the deliberative process of the governmental body. Second, the letter consists only of allegations of fact and notice of proposed governmental action. *See generally* Open Records Decision No. 462 (1987) (factual information severable from advice must be disclosed).

We turn now to the documents compiled in the investigation conducted by or for the board. Although you do not assert exceptions 3(a)(1), (a)(2), (a)(3), (a)(7) and (a)(11) with regard to every investigative document, you assert four or five of the exceptions with regard to every document but one. Those documents are labeled exhibits 2 through 5 and 7 through 13. You assert only exception 3(a)(11) with regard to exhibit 6. The following discussion treats exhibits 2 through 13 as a whole since none of the exceptions apply to any of the documents.

You assert that section 3(a)(3) excepts from disclosure the documents compiled in the investigation conducted by or for the board. Although no investigative report was prepared, investigative documents were obtained, and you state that the settlement agreement makes those documents confidential. As we stated earlier in our discussion of section 3(a)(3) with regard to the July 9, 1990, notice letter, the board may not contract to make public information confidential, subject itself to suit for violation of that contract, and use section 3(a)(3) to avoid disclosure as required by the Open Records Act. The Open Records Act does not permit governmental bodies to use their contractual powers to avoid compliance with the act. *See* Open Records Decision No. 283 (1981). Thus, section 3(a)(3) is not applicable to these investigative documents.

You also assert sections (3)(a)(1) and (3)(a)(2) protect the investigative documents from disclosure. As we explained above, the tests under section 3(a)(1) and 3(a)(2) are the same. Under the test for invasion of privacy under either section, information is excepted from disclosure if it contains highly intimate or embarrassing facts about a person's private affairs, the release of which would be highly objectionable to a person of ordinary sensibilities, *and* it is of no legitimate interest to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., *supra*. The public has a legitimate interest in the investigative documents, and thus, sections 3(a)(1) and 3(a)(2) are not applicable.

Your letter dated October 8, 1990, explains that the board retained a private attorney to gather evidence and present the case against the superintendent to the board. We are advised that the investigative documents, which you have labeled exhibits 2 through 13, were compiled as a result of the investigation and were used in preparation of the notice to terminate letter. You contend that section 3(a)(7) applies to the investigative documents. We disagree. Section 3(a)(7) does not protect factual material compiled by attorneys performing investigative work as agents for the board. The exhibits contain either factual information, requests for facts from third parties, or a report of investigative findings from the board's attorney to the superintendent. Open Records Decision No. 462 (1987); *see also* Open Records Decision No. 574 (1990) (section 3(a)(7) protects only privileged attorney-client communications).

You also assert that section 3(a)(11) protects the investigative documents. Again, we disagree. Section 3(a)(11) protects advice, opinion, and recommendation and not the factual information or requests for facts contained in exhibits 2 through 13. *See* Open Records Decision No. 464 (1987). In particular, exhibit 6 contains facts reported by the district to a state agency for informational purposes and not advice, opinion, or recommendation.

In summary, you must disclose the notice letter and investigative documents that have been requested. We have enclosed copies of Open Records Decision Nos. 283 (1981); 349 (1982); 462, 464 (1987); 551, 559, 574, and 579 (1990).

Since previous determinations of this office as well as case law resolve your request, we are resolving this matter with this informal letter ruling rather than with

a published open records decision. If you have questions about this ruling, please refer to OR91-173.

Yours very truly,

Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/lb

Ref.: ID# 10794, 11613, 11819, 11828

Enclosure: Open Records Decision Nos. 283, 349, 462, 464, 551, 559, 574, 579 (1990).

cc: Shirley Selz
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